

Non-payment of hire, the cancellation and suspension clauses in time chartering agreements and the remedies given the party not in breach

A comparative study of the remedies given the innocent party under Norwegian and English law when faced by a breach of contract in terms of non-payment of hire and delay in the delivery of a vessel under time chartering agreements in the light of recent development in English case law.

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1 Introduction

All contracts begin with an offer and are concluded by the acceptance of said offer. Once the offer is accepted, an agreement is concluded.¹ All commercial contracts contain both rights and obligations; an obligation to deliver something and the right to receive something. Often the consideration will be a monetary compensation.

In larger contracts, the contracting party that is to receive money from the other party will often be in need of receiving payment not at the end of the contract, but several times during the contracting period. This is the case in offshore contracts, in onshore construction contracts, in shipbuilding contracts and this is certainly the case in chartering agreements. Simply, most contracting parties does not have the financial strength to perform its obligations and spend money in order to perform its obligations without seeing payment in return continuously. Nor are they willing to bear the risks of the opposite party's solvency at the end of the contract.

In chartering agreements in general, the obligation to pay hire must often be paid on a monthly basis in advance.² Payments in advance are preferred by the ship-owners and often used in chartering agreements as the ship-owner as the carrier will have to pay all costs related to the vessel itself, including crew salaries and expenses, e.g. insurance port salaries related to the crew etc., in the everyday services of the vessel chartered.³ Therefore, the

¹ In Norway this is regulated by the Norwegian Act on the Conclusion of Agreements 1st chapter (*Avtaleloven, LOV-1918-05-31-4, 1ste kapitel*). On English law, see H.G. Beale, "Chitty on Contracts, vol. 1", §§ 2-001-2078.

² Falkanger, Bull, Brautaset, "Scandinavian maritime law", p. 434. See also inter alia NYPE 93 Clause 11 (a) stating that payment must be made 15 days in advance; Shelltime 4 Clause 9 stipulating that payment must be made a month in advance. See also Coghlin, Baker, Kenny, Kimball, Belknap, Jr., "Time Charters", The Norwegian Maritime Code also operates with a payment of hire 30 days in advance, see Section 391.

³ See inter alia NYPE 93 Clause 6, Shelltime 4 Clause 6. See also Falkanger, "Konsekutive reiser", p. 120, Michelet, "Håndbok i tidsbefraktning", § 6, and Falkanger, Bull, Brautaset, "Scandinavian maritime law", p. 417.

advance hire payments function as security for the ship-owners as they could otherwise experience difficulties and problems of liquidity if payments were not due in advance and were left un-paid or paid late. Bearing in mind that most ship-owners hold titles to numerous vessels, the importance of timely payment is even greater in order to limit the financial risks of the ship-owner.

When timely payment of hire as such is certainly of the essence for the ship-owner, the chartering agreements must contain a remedy in case of non-payment or late payment. Often the ship-owner will be protected by a suspension and/or a cancellation clause.⁴ The charterer on the other hand must know what awaits him or her if he or she is in default when it comes to the payment of hire. The content and the extent of the suspension and cancellation clauses and to which extent the breach of contract the innocent party can claim damages, will be essential to the contracting parties.

In 2013, an English Commercial Court judge found that payment of hire was a condition of a chartering agreement governed by English law.⁵ In the early spring 2015, a different English judge with the same Commercial Court, however, found the opposite.⁶

Both decisions contain numerous considerations on several distinct legal issues, inter alia repudiatory breach, the validity of the charterparty guarantees and how to assess damages for repudiatory breach of chartering agreements. These issues will not be discussed in this thesis. However, the decisions have caused for a substantial amount of concern and unrest in the maritime industry. Is payment a condition under a charterparty? When and under which circumstances can contracting parties claim damages in case of cancellation of charterparties stemming from the default in hire payments?

⁴ See sections 3, 4.2, and 4.5.

⁵ *Kuwait Rocks Co -v- AMB Bulkcarriers Inc (the Astra)* [2013] EWHC 865 (Comm). Referred to as “the Astra” in the following.

⁶ *Spar Shipping AS v. Grand China Logistics Holding (Group) Co. Ltd* [2015] EWHC 718 (Comm). Referred to as “the Spar Shipping” in the following.

A vast number of law firms working within the maritime sector internationally has subsequent to both decisions published updates and shorter summaries, most of them advising that anyone involved in chartering agreements seek particular advice before entering into any charterparty. This thesis will introduce the two decisions by way of shorter analyses in order to discuss the English point of view and legal position and compare this to the legal position under Norwegian law.

In order to do so, both the legal position in English law and the legal position in Norwegian law governed by the Norwegian Maritime Code will be introduced, and the right to cancellation and suspension of performance in chartering agreements will be put into perspective.

The importance of an investigation of the content of and the possible consequences of the two English cases for maritime law in Norway is imminent. As Professor Trond Solvang has put it; *“when case law has proved the need for interpretation under English law, this is an indication of the need for similar questions of interpretation had the case been subject to Norwegian law.”*⁷

Secondly, the thesis will focus on one of the issues raised amongst lawyers subsequently to the recent development in English law: the need for what has been referred to as “commercial certainty”. In this regard, the thesis will include the cancellation clauses giving the charterer the right to cancel the charterparty if the ship-owner fails to provide the vessel at his or her disposal at the agreed point in time.

Further, the thesis will describe and compare four of the most commonly used standard chartering agreements in order to analyse whether the wording of these takes sufficient

⁷ Solvang, Trond: “Forsinkelse i havn”, p. 59 – my translation. Originally as follows: *”Når kontraktspraksis har avdekket behov for fortolkningsavklaring, er dette en klar indikasjon på hvilke tolkningsspørsmål som ville ha opstått om den same kontraktspraksis hadde vært underlagt norsk rett”*.

consideration to the needs and challenges of the contracting parties knowing that the shipping industry and the market for vessels on time charter parties will never be stationary.

The thesis will lastly contain a discussion and offer a view on how to proceed from here as two English precedents are directly contradictory.

2 Sources of law – the structure of the thesis

Every contractual relationship starts with a contract. If the background law provides mandatory rules on the subject matter, the contract is basically irrelevant. If not, the understanding of said contract is determined by the content of the contract. If any of the contractual provisions needs interpretation, one must look to the background law. If the background law, including case law etc., however, does not provide advice, one must look elsewhere, e.g. legal theory, scholarly writings etc.⁸

In the following, the examination of cancellation and suspension clauses will thus begin with four of the most common charterparties used in the industry to introduce the clauses as they are often drafted. Then, the legal positions on the clauses both in maritime law and in the background contract law in England and Norway will be investigated, followed by the examination of recent English case law. Lastly, a discussion as to the future development and a conclusion on whether or not the clauses provide sufficient commercial certainty to the contracting parties will be done.

3 Cancellation and suspension clauses in time chartering agreements

Contractual provisions containing a right to cancel the chartering agreement originate from the 1300's around Visby in Sweden, where provisions giving the charterer a right to withdraw and thereby cancel any voyage chartering agreement against monetary compensation to the ship-owner. Thus, the charterer could cancel the contract if he or she was willing to

⁸ Falkanger, Bull, Brautaset, "Scandinavian maritime law", p. 34-43.

pay half the freight agreed between the parties.⁹ Similar types were later introduced in other European countries.¹⁰

Traditionally, time chartering agreements contain a date and time for the point in time where the vessel must be at the disposal of the charterers.¹¹ Sometimes this is done by setting a fixed time and date, sometimes just a date, and sometimes the time charterparties only contain the point in time after which the charterers can cancel the agreement.¹² This indication is sometimes referred to as the “cancellation date” but in the following the term “cancellation time” will be used. This is the term used in the Norwegian Maritime Code as “time” is more precise than “date”.¹³

Ship-owners and charterers throughout the shipping industry are using standard time chartering agreements, adapted or added individually negotiated sections or choices, on a daily basis. Some of the most commonly used are the New York Produce Exchange, the Baltime, the Supplytime, and the Shelltime, which are introduced in the following.

3.1 New York Produce Exchange Time Charter (NYPE93)

The New York Produce Exchange form recommended by The Baltic and International Maritime Council (BIMCO) and The Federation of National Associations of Ship Brokers and Agents is one the world’s most renowned and used time charterparties, and was the centre of attention in both the Astra and the Spar Shipping cases.

⁹ Bråfelt, Camilla, ”Fleksibilitet i certepartiforhold”, p. 125.

¹⁰ Bråfelt, Camilla, ”Fleksibilitet i certepartiforhold”, p. 126.

¹¹ Falkanger, Bull, Brautaset, “Scandinavian maritime law”, p. 424ff.

¹² See sections 3.1, 3.2, 3.3, 3.4, 4.2.1 and 4.5.1.

¹³ Bredholt, Martens, Mathiasen, Philip, “Søloven med kommentarer”, p. 584.

3.1.1 The ship-owner's right to cancel and the remedies following such cancellation

Clause 11 regulates the hire payment. The clause stipulates that payment of hire must be paid 15 days in advance and, if not received by then, the ship-owners must issue a notice to the charterer informing he or she of the non-compliance with the contractual provision. The notice must contain a deadline for the charterer to make full payment of the outstanding amount. After the expiry of the so-called grace period,¹⁴ the ship-owners are entitled to withdraw the services of the vessel and thereby cancel¹⁵ the chartering agreement.¹⁶ The same is true if the non-payment is deemed a "*fundamental breach*" of the charterparty.¹⁷

The charterparty does not contain provisions as to regulate the right to damages for the party not in breach, which is then subject to determination by using the background law of the country chosen by the contracting parties. The NYPE93 Clause 45 offers two opportunities; American law or English law.

However, the charterparty does expressly state that the ship-owners shall be entitled to receive payment of hire and any extra expenses resulting from the withholding of the service of the vessel as a result of the missing payment. Accordingly, the ship-owner does not risk to have to do another voyage if the vessel has been loaded and bills of lading issued without receiving proper compensation.¹⁸

¹⁴ The clause ensuring a grace period is also called an "anti-technicality note", as was the case in the *Astra* case. In e.g. international sales law the concept is often explained using the German concept "Nachfrist". See in this regard section 5.2.1.1.

¹⁵ See BIMCO's explanatory note to the NYPE93 Clause 11 as the term "withdraw" is equivalent to cancelling available at See also section 4.5.1 below.

¹⁶ NYPE93 Clause 11 (lines 140-166).

¹⁷ NYPE93 Clause 11 (line 149).

¹⁸ See the BIMCO's explanatory note to the NYPE 93 Clause 11 and Coghlin, Baker, Kenny, Kimball, Belknap, Jr., "Time Charters", § 16.90-16.91.

3.1.2 The charterer's right to cancel

The charterers have the possibility to cancel the charterparty if the vessel is not at the disposal of the charterers no later than at the point in time indicated in the contract.¹⁹ The form does therefore not contain a delivery time but only a cancellation time.²⁰ Therefore, the charterers may at their convenience choose to cancel the chartering agreement, regardless of whether or not the delay was substantial or not. The mere fact that the vessel was not – or could not be – at the disposal of the charterers in the agreed condition, seaworthy and ready to load, is decisive.²¹

The ship-owners may, however, require the charterers' answer to whether or not they will accept a later delivery of the vessel. In such case, the ship-owners must provide a new time of delivery issued with reasonable certainty. Such request made by the ship-owners cannot be issued earlier than seven days before the new delivery time. If the charterers fail to reply within two days after having received this request from the ship-owners, the new point in time will be regarded the delivery time of the vessel. If the delivery of the vessel is once again late, the process can begin all over.²²

3.2 **Baltimex 1939 (as revised 2001)**

The BIMCO Uniform Time-Charter was originally issued in 1909 and amended lastly in 2001. The time chartering agreement is issued by The Baltic and International Maritime Council (BIMCO) and is subject to English law.²³

¹⁹ NYPE93 Clause 16 (lines 205-208).

²⁰ Coghlin, Baker, Kenny, Kimball, Belknap, Jr., "Time Charters", § 7.5 and § 8.35.

²¹ Bråfelt, Camilla, "Fleksibilitet i certepartiforhold", p. 198-200.

²² NYPE 93 Clause 16 (lines 210-218).

²³ Baltimex 1939 (2001) Clause 22(A) (lines 354-360).

3.2.1 The ship-owner's right to cancel and the remedies following such cancellation

The Baltime provides that hire must be paid in advance in the currency agreed upon by the contracting parties and, if not or paid late, the ship-owners shall have the right to withdraw the vessel of the service of the charterers without interference or protest.²⁴ The charterparty contains no provisions as to the remedies of non-payment of hire, nor provisions on the right to interest on the outstanding hire payments.

3.2.2 The charterer's right to cancel

The charterers have the right to cancel the chartering agreement if the vessel is not delivered at the time agreed upon by the parties. Therefore, the charterers may choose to cancel the chartering agreement or not, regardless of whether or not the delay was substantial or not. The mere fact that the vessel was not – or could not be – at the disposal of the charterers in the agreed condition, seaworthy and ready to load, is decisive.²⁵

If, however, required by the ship-owners, the charterers must indicate within two days whether or not the charterers will accept delivery at another given point in time.²⁶

3.3 Supplytime 2005

The Uniform Time Charter Party for Offshore Service Vessels known as the Supplytime is issued by BIMCO and adopted by, inter alia, the International Support Vessel Owners' Association in London. The version subject to the following examination is from 2005 and is subject to English law.²⁷

²⁴ Baltime 1939 (2001) Clause 6 (lines 80-92).

²⁵ Bråfelt, Camilla, "Fleksibilitet i certepartiforhold", p. 198-200.

²⁶ Baltime 1939 (2001) Clause 21 (lines 347-352).

²⁷ Supplytime 2005 Clause 34(a) (lines 1284-1294).

3.3.1 The ship-owner's right to cancel and the remedies following such cancellation

If payment of hire is not paid when due, the ship-owner is entitled to receive interests on the outstanding hire agreed upon by the contracting parties.²⁸

Supplytime 2005 also contains provisions stipulating that where the charterer has failed to provide timely payment of hire, the ship-owner must provide a written notice to the charterer giving he or she an additional period to make payment. The ship-owners are, however, entitled to suspend the performance of the vessel at once²⁹ but even whilst suspended, the vessel remains on-hire.³⁰

If payment of hire is still not received by the ship-owners five days after the issuance of the written notice, the ship-owners may withdraw the vessel from the service of the charterers thereby cancelling the chartering agreement. This right of withdrawal remains whilst the hire payment is still not received but the receipt of hire payment before the issuing of a withdrawal notice is not a waiver of the ship-owner's right to cancel the chartering agreement.³¹ Thus, the ship-owner can withdraw the vessel from the service of the charterer even after having received hire payment with reference to the payment history. This is explicitly stated in Clause 12(f) para. (iii).

The charterparty expressly limits the liability of the parties in terms of consequential damages.³² This provision, however, applies to performance claims under the charterparty and a mutual obligation for each party to defend the other if a claim for which the other party is liable is claimed from the non-labile party. The limitation to the liability does therefore not apply in the internal relationship between the parties to the charterparty. However, the char-

²⁸ Supplytime 2005 Clause 12(e) (lines 473-477).

²⁹ Supplytime 2005 Clause 12(f) para. (i) (lines 491-502).

³⁰ Supplytime 2005 Clause 12(f) para. (i) (lines 497-502).

³¹ Supplytime 2005 Clause 12(f) para. (ii) (lines 503-516).

³² Supplytime 2005 Clause 14(c) (lines 671-682).

terparty does not contain provisions as to regulate the right to damages for the party not in breach, which is then subject to determination by English law.

3.3.2 The charterer's right to cancel

If the vessel is not delivered at the point in time indicated in the chartering agreement, the charterer may cancel the contract. However, if the ship-owner is not able to deliver the vessel at the agreed time and notice to the charterer in this regard is given, the charterer must provide the ship-owner with an answer as to whether or not he or she will accept delivery of the vessel at a later point in time. Such notice must be given within 24 hours of receipt of such notice. If the chartering agreement is cancelled by the charterer, none of the parties are liable to the other in terms of losses incurred by neither the non-delivery nor the cancellation of contract.³³

3.4 Shelltime 4

Shelltime 4 is a well-renowned time chartering agreement subject to English law. Shelltime 4 is drafted by Shell International Trading and Shipping Company Ltd., but is used by other parties but the ones involved in transactions with Shell.

3.4.1 The ship-owner's right to cancel and the remedies following such cancellation

The payment of hire under the charterparty is regulated by Clause 9 of the agreement. In case of the charterer's failure to provide timely payment, the ship-owners must issue a written notification to the charterer granting him or her an additional period of 7 days to make payment.³⁴ After the expiry of this grace period, the ship-owner may withdraw the vessel from the service of the charterer and is entitled to interest on the unpaid amount.³⁵ Thus,

³³ Supplytime 2005 Clause 2(c) (lines 48-65).

³⁴ Shelltime 4 Clause 9(a), Coghlin, Baker, Kenny, Kimball, Belknap, Jr., "Time Charters", § 37.64.

³⁵ Shelltime 4 Clause 9(b).

the charterer must pay the outstanding amount, including both the late hire payment owed and the interests accrued.³⁶

The charterparty does not contain provisions as to regulate the right to damages for the party not in breach, which is subject to determination by English law.

3.4.2 The charterer's right to cancel

The charterers have the possibility to cancel the chartering agreement if the vessel is not at the disposal of the charterers no later at the point in time indicated in the contract.³⁷ The charterparty contains no provisions on damages or remedies for the charterer if the vessel is not delivered timely.

3.5 Comparison of the four time chartering agreements' provisions on delay in the payment of hire and in the delivery of the vessel to the charterer

All of the four standard time chartering agreements introduced above give the ship-owner the right to withdraw the vessel from the services of the charterer and to cancel the charterparty if the charterer does not pay hire. In all but the Baltime this right is subject to the issuing of an extended time-limit for the charterer to make payment. The extent of the additional time periods the ship-owner must give the charterer to re-deem him- or herself and make full payment varies from 5 days in the Supplytime to 7 days in the Shelltime, whilst there is no default choice in the NYPE 93. Further, all of the four chartering agreements contain provisions on interests on outstanding amounts.

Also, all of the four standard chartering agreements examined above also gives the charterer the right to cancel the contract if or when the ship-owner fails to deliver the vessel at the agreed point in time. It is however worth noting that e.g. the older version of the NYPE 93,

³⁶ Coghlin, Baker, Kenny, Kimball, Belknap, Jr., "Time Charters", § 37.64.

³⁷ Shelltime 4 Clause 5, Coghlin, Baker, Kenny, Kimball, Belknap, Jr., "Time Charters", § 37.49.

the NYPE 46, does not grant the charterer such right. Therefore, there are still time charterparties which do not contain such provisions and, thus, the legal positions of the country chosen as the background law in the contracts are of decisive for the outcome.

None of the charterparties contain provisions on the remedies if faced by a breach of contract by the opposing contracting party. As such, the extent and legal understanding of any rights and obligations given under the contract are subject to the governing law. This is a choice made by the contracting parties. As showed, the default rule of all four of the contracts are a choice of English³⁸ – or in one instance American – contract law. Therefore, the background law including recent English case law on the matter will be decisive when establishing the legal position.

The contracting parties are however free to choose e.g. Norwegian law to govern the contract matter and then the Norwegian background law would be applicable.³⁹ Therefore, although the contracts do provide provisions regulating the remedies both in terms of cancellation and suspension if a breach of contract occurs, the threshold for when a breach is substantial enough to make a cancellation of contract reasonable and justifiable is subject to the background contract law.

The examination of English and Norwegian maritime law on cancellation and suspension clauses will be done in section 4, whilst recent English case law will be examined in detail below in section 5.

4 The legal positions in Norway and in England

In the hierarchy of the sources of law in Norway, the Norwegian Maritime Code and other legislation and the interpretation of these are the primary sources of law. Then comes the

³⁸ Or American law in the NYPE 93, see Clause 45.

³⁹ See the Norwegian Civil Procedure Act § 4-6 and Falkanger, Bull, Brautaset, “Scandinavian maritime law”, p. 36.

contract itself and the interpretation of the contractual provisions. Case law, legal theory, scholarly writings etc. can however play a part in both the aforementioned when determining the legal position and outcome in a specific situation.⁴⁰

In England, the legal outcome will depend on the contractual provisions the parties have agreed upon. How is the contract drafted and how must the provisions naturally be understood? This is in England known as the principle of the “four corners of the contract”.⁴¹

4.1 Norwegian contract law

Often books, theory and scholarly writings on contracts or related to contracts are often commenced with an opening remark on offer and acceptance or with a Latin quote on the binding nature of concluded contracts. However, the right to terminate a contract when the opposite contracting party is severely breaching its obligations under the contract is an equally important cornerstone of any contract. It is a prerequisite for anyone entering into an agreement. Any other right to terminate the contract may as well be included in the contract itself; an expiry date or a re-negotiation clause or automatic cancellation if or when specific circumstances occur.⁴²

If met by a substantial breach of contract under circumstances, the innocent party can choose between three options; (i) specific performance (in Norwegian: “*naturatoppfyllelse*”), (ii) cancellation and (iii) damages.⁴³ A claim for specific performance can be combined with a claim for damages in that regard, and likewise in case of cancellation of the contract.⁴⁴

⁴⁰ Falkanger, Bull, Brautaset, “Scandinavian maritime law”, p. 26-39.

⁴¹ Falkanger, Bull, Brautaset, “Scandinavian maritime law”, p. 31.

⁴² On cancellation of contracts, see Kai Krüger ”Norsk Kontraktsrett” § 43, Viggo Hagstrøm, ”Obligasjonsrett”, chapter 18, Bråfelt, Camilla, ”Fleksibilitet i certepartiforhold”, p. 117-121.

⁴³ The principles in the Norwegian Sale of Goods Act (lov 1988-05-13-27) § 22(1) applies.

⁴⁴ The Norwegian Sale of Goods Act (lov 1988-05-13-27) § 22(1), 2nd para.

Normally, specific performance of the obligations under the contract even though specific performance is the starting point when it comes to remedies under Norwegian law⁴⁵ but traditionally, the remedy in case of breach of contract within the transport sector in Norway has been damages.

The background for this deviation from the Norwegian “normal” seems to be the influence from common-law countries such as the English and American systems, where damages are used when they are deemed to be adequate to protect the expectation interest of the party not in breach.⁴⁶ Which may be all types of disputes where the expectation interest is of a generic sort and not a specific.⁴⁷

In shipping and transportation of cargo by ship the needs are hard to describe in general. Sometimes the cargo owner will need a vessel of a very generic type for the transportation of generic cargo (or at least cargo in generic packages, inter alia containers). At other times, the need will be more specific calling for the usage of a specific vessel able to carry or load a specific cargo. In the latter examples the need for specific performance will thus be of greater importance and the remedy of damages less suitable in the event of breach of contract.

In the evaluation as to whether or not a contract has been substantially⁴⁸ breached and, therefore, may be terminated by the party not in breach, one is to determine whether the cancellation would be a reasonable and proportionate remedy for the breach of contractual

⁴⁵ Falkanger, Bull, Brautaset, “Scandinavian maritime law”, p. 44, Kai Krüger ”Norsk Kontraktsrett”, p. 749, Viggo Hagstrøm, ”Obligasjonsrett”, chapter 15.2, Bråfelt, Camilla, ”Fleksibilitet i certepartiforhold”, p. 122.

⁴⁶ Bråfelt, Camilla, ”Fleksibilitet i certepartiforhold”, p. 123.

⁴⁷ See in this regard the works of Trond Solvang discussing the possibility to offer a different but identical ship under a shipbuilding contract in order to perform contractual in “Right of substitution under building contracts” reviewing the arbitration award ND 2001.526.

⁴⁸ Substantially is my choice of term. Equally suitable would be both the terms ”materially” and ”repudiatory”.

obligation conducted by the other contracting party.⁴⁹ In this evaluation the nature, the length, and the circumstances surrounding the breach of contract must be taken into account. I will revert to the substantiality of a breach of contract on a more specific note below section 4.2.1.3.

4.2 The Norwegian Maritime Code

The Norwegian Maritime Code contains three provisions regulating the cases where either (i) the charterer has not provided the hire in a timely manner or (ii) the ship-owner is in delay supplying the charterer with the vessel. In both examples a breach of contract thus exists.

The provisions are comparable to the provisions contained in the standard time chartering agreements used amongst the contracting parties of the industry, which were introduced in section 3. The three provisions will be introduced in the following.

4.2.1 The right of suspension and cancellation in Section 391 following the delay in payment if hire under time chartering agreements

4.2.1.1 Payment of hire

Time chartering agreements governed by Norwegian law will often contain a provision stating that the hire shall be paid in advance, either every two weeks (15 days) as is the case with e.g. the NYPE 93⁵⁰ time chartering agreement or monthly.⁵¹ In the Norwegian Maritime Code Section 390 the declaratory rule is that hire must be paid 30 days in advance.⁵²

This is a deviation from the the general principle in Norwegian contract law that the contracting parties are to perform each of its contractual obligations at the same time – in

⁴⁹ Viggo Hagström ”Obligasjonsrett”, chapter 15.3.2, Kai Krüger ”Norsk Kontraktsrett”, p. 673-674.

⁵⁰ NYPE93 Clause 11, lines 141-152.

⁵¹ Michelet, “Håndbok i tidsbefraktning”, p. 250-251.

⁵² See the Norwegian Maritime Code Section 390(1).

Norwegian the principle of “*ytelse mot ytelse*”. This is however not possible in time charterparties due to the natural circumstances of the contractual relationship.⁵³ One of the contracting parties must thus perform its contractual obligation in advance, either the ship-owner or the charterer.⁵⁴ The parties are however free to agree on different payment schemes.⁵⁵

If the charterer does not comply with the demand for payment, the charterer will be in breach of contract by default of payment. The ship-owner then has the three possibilities introduced above; (i) specific performance, (ii) cancellation and (iii) damages.⁵⁶ A demand for specific performance can be combined with a claim for damages in that regard, and likewise in case of cancellation of the contract.⁵⁷

The possibility to claim specific performance is natural as the hire is an obligation under the time chartering agreement, and the party not in breach under any agreement under Norwegian law can claim specific performance by its counterpart. The second possibility is governed either by the contractual provisions or by law. As a general rule, contracts governed by Norwegian law can only be cancelled when the breach of contract is regarded to be substantial. However, the barrier for when a breach is considered substantial is either governed by the contract itself and thus stems from the meeting of minds of the contracting parties at the time of conclusion of the chartering agreement, or governed by the background law.⁵⁸

⁵³ Or in any contracts of hire, such as the hire of buildings etc.

⁵⁴ Falkanger, “Leie av skib”, p. 429.

⁵⁵ The Norwegian Maritime Code Section 322.

⁵⁶ See section 4.1 The principles in the Norwegian Sale of Goods Act (lov 1988-05-13-27) § 22(1) applies. See Bredholt, Martens, Mathiasen, Philip, “Søloven med kommentarer”, p. 603.

⁵⁷ See section 4.1.

⁵⁸ See section 4.2.1.3.

4.2.1.2 The cancellation and suspension rights when payment of hire is delayed – Section 391

The the Norwegian Maritime Code Section 391(1) gives the ship-owner the right to receive interest on any outstanding amount originating from default in hire payments. Further, Section 391(2) stipulates that the ship-owner⁵⁹ must issue a notice to the charterer informing him or her of the default in payment. After having issued this notice, the ship-owner is entitled to withdraw the vessel from the services of the charterer.⁶⁰ Pursuant to Section 392(1), the vessel will remain on-hire throughout the suspension.⁶¹ If the charterer has not paid the hire due within 72 hours after the notification was given, the ship-owner is entitled to cancel the time chartering agreement.⁶² Unless of course the parties have agreed otherwise.⁶³ The right in section 391 for the ship-owner to suspend the performance is however exclusively in case of non-payment of the hire.⁶⁴

When the ship-owner has suspended performance under the chartering agreement or the chartering agreement has been cancelled, the ship-owner is entitled to damages, unless the charterer can show that the late payment was caused by a hindrance out of its control and this hindrance could not reasonably have been foreseen, avoided or overcome by the time charterer at the time of the conclusion of the chartering agreement.⁶⁵

⁵⁹ The Norwegian Maritime Code uses the term "time carrier" in order to cover cases where the carrier may not be the ship-owner but, e.g. have chartered the vessel from the ship-owner on either a bareboat charterparty or a time charterparty and is sub-chartering out the vessel.

⁶⁰ Wording of Section 391(2).

⁶¹ Bredholt, Martens, Mathiasen, Philip, "Søloven med kommentarer", p. 604.

⁶² Wording of Section 391(2).

⁶³ Michelet, "Håndbok i tidsbefraktning", p. 261.

⁶⁴ Michelet, "Håndbok i tidsbefraktning", p. 259, Falkanger, Bull, Brautaset, "Scandinavian maritime law", p. 438-439.

⁶⁵ Wording of Section 391(3), Falkanger, Bull, Brautaset, "Scandinavian maritime law", p. 438-439.

Leading Norwegian theory is stating that the default of hire payments under time charterparties traditionally has been considered a “*serious breach of contract*” making the charterer liable to suffer the consequences of suspension and cancellation of the chartering agreement even from a minor deviation from the provisions in the agreement.⁶⁶

The delay of payment itself is thus sufficient for the charterer to be liable for damages pursuant to Section 391(3) as the liability is “*strict*”.⁶⁷ This means that the charterer as a starting point is liable even without fault and, thus, that damages must be paid regardless of the reason for the delay, exempt for instances of unforeseeable breakdown of the payment systems etc. completely out of the charterer’s control sphere. There are contradicting view in Norwegian legal theory stating that it is somewhat doubtful that a Norwegian court will find that a contractual provision giving the right to terminate in case of a minor breach of contract should be enforceable.⁶⁸ The wording of any contract or clause in a contract could as such be subject to testing in the court system.

Contracts under Norwegian law are, however, as the clear starting point valid when entered into by two legally capable entities, and the contract was concluded voluntarily and not caused by fraud etc.⁶⁹ When two professional parties are acting within their field of expertise it is unlikely to have set aside contractual provisions, save for examples of fraud or other unlawful actions.⁷⁰

⁶⁶ Falkanger, Bull, Brautaset, “Scandinavian maritime law”, p. 436 and Michelet, “Håndbok i tidsbefraktning”, p. 261 ff.

⁶⁷ Falkanger, Bull, Brautaset, “Scandinavian maritime law”, p. 439 and p. 458.

⁶⁸ Bråfelt, Camilla, “Fleksibilitet i certepartiforhold”, p. 189-191.

⁶⁹ The Norwegian Act on the Conclusion of Contracts 3rd chapter (*Avtaleloven, LOV-1918-05-31-4, 3dje kapitel*).

⁷⁰ The Norwegian Supreme Court has previously decided that the section applies also between professional parties in the decision in Rt. 1985.234 and this has later been reiterated – although the opinion is expressed by the minority of the judges deciding the case, but the point was however not contradicted. It is thus acknowledged that Section 36 of the Norwegian Act on the Conclusion of Contracts applies also to contractual relationships between professional parties, see also Rt. 1999.922. The threshold for the courts to set aside contrac-

Legal theory suggests however that in theory a contractual provision stating that even the slightest delay in payment should be regarded a substantial breach, could be set aside even if the contract stipulated so.⁷¹ This principle is also envisaged by the Norwegian Maritime Code Section 391(3) stating that the time charterparty can only be terminated as a consequence of missing payment if the delay in payment is not caused by hindrances unforeseeable to the charterer.⁷² However, payment of hire is regarded a substantial part of the contract and will be upheld strictly:

*“As for the payment of hire is concerned, the contract would most likely be upheld: That the hire must be paid timely is of great significance, and only rarely would there be doubt as to the point in time to pay (the hire)”*⁷³

In this regard it must be noted that Norwegian courts traditionally have been very reluctant to adjust a clear wording in a commercial contract, whether it be on the basis of interpretation or the unreasonableness standard in the Norwegian Act on the Conclusion of Contracts Section 36.⁷⁴

The Danish commentary to the Danish Maritime Code⁷⁵ suggests the same stating that “a rule resulting in the right terminate the contract on the grounds of any delay would be un-

tual provisions is however substantial when both parties are professional acting within their field of expertise or business. See in this regard Rt. 2000.806. Later, the Supreme Court has also stated that the use of Section 36 between professional parties demand “special circumstances”, see Rt. 2008.969, para. 39.

⁷¹ Falkanger, “Leie av skib” p. 458.

⁷² See section 4.2.1 for a specific presentation of the provision.

⁷³ Falkanger, “Leie av skib”, p. 458. My translation, originally “*Forsåvidt angår leiebetalingen, vil ordningen formodentlig bli opprettholdt: At hovedvederlaget skal betales punktlig, er av vesentlig betydning, og det vil sjelden være tvil om når og hvorledes dette skal gjøres*”.

⁷⁴ See footnote 70.

⁷⁵ Bredholt, Martens, Mathiasen, Philip, “Søloven med kommentarer” is the Danish Commentary to the Danish Maritime Code. The publication is relevant also in the understanding of the Norwegian Maritime Code as the acts are identical, cf. Falkanger, Bull, Brautaset,

reasonable”⁷⁶ and thus possibly be set aside by the courts. The reasonability test thus provides that if the charterer does not rectify the missing payment by paying the hire within an additional time limit fixed by the ship-owner. The declaratory rule in Norwegian Maritime Code is 72 hours, see Section 391(3).⁷⁷

In conclusion, this means that the ship-owner under Norwegian law rightfully can terminate a contract without fear of being in breach of contract himself if the charterer has been provided an extended period of at least 72 hours to pay the hire and the charterer has not met this deadline and provided full payment. This is also the case for voyage charterparties.⁷⁸ This also means that the ship-owner cannot rightfully terminate the contract prior to the expiry of the 72 hours grace period⁷⁹, unless the ship-owner terminates the contract with reference to anticipatory breach, which may incur prior to the expiry of the 72 hour limit.⁸⁰ In both cases however provided that the delay in payment is not caused by someone or something out of the charterer’s control and unforeseeable for the charterer.⁸¹

4.2.1.3 Lowering the threshold for the substantiality of a breach of contract by agreement

The provision in the Norwegian Maritime Code Section 391 is not mandatory. As such, it can be deviated from by agreement by the parties.⁸²

“Scandinavian maritime law”, p. 31. In the making of the Danish Commentary the use of Norwegian legal theory is widespread.

⁷⁶ My translation, originally in Danish: “*en regel om, at enhver forsinkelse giver ret til at hæve, vil være urimelig*”.

⁷⁷ The additional time period for the party in default to rectify his or her breach of contract is known from the Norwegian Sale of Goods Act (lov 1988-05-13-27) § 25. The German term for the same “Nachfrist” is widely acknowledged and used in international sales law. See the Bredholt, Martens, Mathiasen, Philip, “Søloven med kommentarer”, p. 555 and p. 603 and Michelet, “Håndbok i tidsbefraktning”, § 8.42.83.

⁷⁸ Bredholt, Martens, Mathiasen, Philip, “Søloven med kommentarer”, p. 575.

⁷⁹ Falkanger, Bull, Brautaset, “Scandinavian maritime law”, p. 438

⁸⁰ Bredholt, Martens, Mathiasen, Philip, “Søloven med kommentarer”, p. 603.

⁸¹ The Norwegian Maritime Code Section 391(3).

⁸² The Norwegian Maritime Code Section 322.

As such, the parties to agreement can lower the threshold for when the parties will have either a right to suspend performances under the contract, or when a breach of contract shall be deemed substantial enough for the innocent party to cancel the agreement. The right to cancel according to the cancellation clause is as such just an agreed option to cancel if certain conditions are met.⁸³

Herman Steen has argued that such an agreement must be explicit and by no means can go any further than what the parties have put on paper in the contract. The exact wording of the contract is thereby decisive. Falkanger seems to go a bit further from the somewhat English approach argued by Steen, as Falkanger proposes that the legal content of such agreement must be sought to be found by way of interpretation of the intentions of the parties, not focusing on the mere wording of the contract's provisions.⁸⁴

Falkanger further argues that even if the parties were not agreeing, one of contractual parties' intentions could be decisive and that an example where for example the ship-owner's special needs were unknown to the charterer at the time of the conclusion of the contract.⁸⁵ Decisive should however be, which contracting party is the closest to bear the risk.⁸⁶ The same argumentation is relevant as far as the suspension clauses are concerned.

There seems to be advantages and disadvantages in both the argumentations. Naturally, the wording of the contractual provision must have a significant part to play when deciding whether or not the parties have agreed to lower the threshold for a breach to be substantial. However, the parties' intention must be involved in the evaluation as well. In order to determine the parties' intention naturally one would look at all the data available, from negotiations etc. to the minutes from the concluding meeting. Thereby, the strictly English ap-

⁸³ Steen, Herman, "Cancellation clauses in voyage charter parties", p. 147.

⁸⁴ Falkanger, "Konsekutive reiser", p. 154-155, Falkanger, "Leie av skip", p. 458.

⁸⁵ Falkanger, "Konsekutive reiser", p. 154-155, Falkanger, "Leie av skip", p. 458.

⁸⁶ Falkanger, "Konsekutive reiser", p. 157.

proach is rejected to its full extent.⁸⁷ On the other hand, even if the parties had discussed the possibility and assumedly also been very near to reaching an agreement as well during the negotiations but not included this in the wording of the contract, this counts in favour of the explicit wording of the contractual provisions in the concluded agreement as the possible outcomes would thus be incalculable and somewhat arbitrary.

The most reasonable outcome would thus be a compromise; a compromise Falkanger seems to be aiming at when suggesting that decisive should be which party is the nearest to bear the risk of the breach in question. If the charterer does not pay the hire timely, the charterer should be able to both suspend performance and terminate the contract thereby claiming damages for the losses in this regard, regardless of any explicit wording in the contract. The charterer is per se the nearest to bear the risk and the consequences of his or her lack of ability to pay the hire timely. The same argument goes for the suspension and cancellation clauses giving the charterer the right to suspend performance and cancel the chartering agreement in case the ship-owner cannot provide the vessel at the time it was promised. As such, the parties can lower the threshold for the substantiality of a breach of contract and the interpretation of such agreement should be in favour of the innocent party.

4.2.1.4 Damages

The ship-owner can claim damages from the point in time where the cancellation of the time charterparty was effected.⁸⁸ As a starting point, the charterer's liability is strict, meaning that the charterer is liable even when no culpable act has been conducted.⁸⁹ This starting point is evidently subject to the provisions in the Norwegian Maritime Code, e.g. Section 391(3), which exempts the charterer from liability if the late payment is caused by unforeseeable miscommunications etc., discussed above.

⁸⁷ The English principle of the four corners of the contract, see section 4.

⁸⁸ Falkanger, "Leie av skib", p. 459.

⁸⁹ Falkanger, "Konsekutive reiser", p. 223, Falkanger, Bull, Brautaset, "Scandinavian maritime law", p. 439 and p. 458. See section 4.2.1.2.

The charterer is potentially liable for all adequate losses suffered as a consequence of the late or missing payment.⁹⁰ This included the loss of bargain in the case of cancellation of the chartering agreement. The damages redeemable for the ship-owner also includes losses suffered from changes in the market and subsequent losses directly linked to the cancellation of the chartering agreement, e.g. lawyers' fees, brokers' fees etc.

However, it must be noted that case law has shown that the time for providing hire payments must be clearly stipulated.⁹¹ In order for the breach of contract to be substantial, the deadline for making hire payments must thus be stipulated explicitly and clearly in the chartering agreement.

4.2.2 The right of cancellation in Section 375 in time chartering agreements when the vessel is delayed

The charterer is entitled to cancel the chartering agreement if and when the vessel is not ready to load at the time agreed upon in the chartering agreement, or if notice of readiness has not been given before said time.⁹²

The charterer is entitled to damages for losses resulting from late delivery under Section 375 of the Norwegian Maritime Code pursuant to Section 377, if the chartering agreement is cancelled.⁹³

⁹⁰ Falkanger, "Konsekutive reiser", p. 223 and Bredholt, Martens, Mathiasen, Philip, "Søloven med kommentarer", p. 603.

⁹¹ This was e.g. not the case in ND 1970.432 DA (The Sunny Lady) where the carrier's change of plans for repairs of the vessel had resulted in a change of the payment plans as well. As a result, the ship-owner could not rightfully withdraw the vessel. See Michelet, "Håndbok i tidsbefraktning", p. 263.

⁹² The Norwegian Maritime Code Section 375(1).

⁹³ Michelet, "Håndbok i tidsbefraktning", § 7.26.

In order to balance the risks between the ship-owner and the charterer, and to avoid unnecessary economic loss, Section 375(2) provides for the ship-owner to provide the charterer a revised date of readiness.⁹⁴ The charterer must thus notify the ship-owner whether or not he or she wishes to cancel the contract. If the chartering agreement is not cancelled or no message from the charterer is provided the ship-owner, the revised date will be regarded the new cancellation time under the chartering agreement.⁹⁵

Further, Section 375(3) of the Norwegian Maritime Code gives the charterer the right to cancel the chartering agreement in any other case of substantial breach of contract caused by late delivery.⁹⁶ The provision is a codification of general principles under contract law.

Legal theory has suggested, however, that Section 376 effects the evaluation as to whether the charterer can cancel the charterparty pursuant to Section 375.⁹⁷ This should thus cause that the charterer could only terminate the charterparty if the delay was substantial. However, the wording of the provision stipulates that Section 376 regulates whether or not the vessel is defect. The point in time for this evaluation is “*on delivery*”.

Section 376 stipulates that the charterer may only cancel the contract if the vessel is in a substantial lesser condition than agreed upon. If the vessel is not suffering from a substantial defect, the charterer may only be compensated economically for the lesser value of the ship through a proportionate discount in hire. However, Section 375 regulates the cancellation right prior to delivery of the vessel.

In a recent case, the court found that the cancellation time was absolute and as the ship-owner was late, the charterer was entitled to damages including the difference in hire on the substitute time charterparty entered into with a third party and the cancelled chartering

⁹⁴ The Norwegian Maritime Code Section 375(2).

⁹⁵ Falkanger, Bull, Brautaset, “Scandinavian maritime law”, p. 426.

⁹⁶ The Norwegian Maritime Code Section 375(3).

⁹⁷ Bråfelt, Camilla, “Fleksibilitet i certepartiforhold”, p. 194-195.

agreement between the ship-owner and the charterer.⁹⁸ Elderly precedents however have stated the opposite and the factual circumstances of each case must thus be carefully considered.⁹⁹ If the vessel arrives delayed, the principle in Section 376 might however influence the charterer's access to cancel the charterparty.

4.3 Sub-conclusion

Declaratory Norwegian provisions grants the ship-owner the right to withdraw the vessel in case of the charterer's late payment of hire and to terminate the chartering agreement altogether if the charterer after the issuance of a notification and the expiry of a grace period if hire has still not been paid. Vice versa, the charterer is granted a right to cancel the contract if the vessel is not at the disposal of the charterer at the agreed point in time.

The rights granted by the provisions are comparable to the ones in the standard chartering agreements examined above in section 3 but distinct when it comes to the grace period given the charterer in order for it to redeem the default in the payment of hire, and the consequences in terms of damages granted the innocent party in either case of breach of contract.

Lastly, the right of suspension is not explicitly granted under the standard chartering agreements.

⁹⁸ ND 2002.242 and Bredholt, Martens, Mathiasen, Philip, "Søloven med kommentarer" p. 584.

⁹⁹ Bredholt, Martens, Mathiasen, Philip, "Søloven med kommentarer" p. 584 with reference to ND 1953.299, ND 1951.176 and ND.1949.312.

4.4 English contract law

4.4.1 Contracts under English law in general

Contracts under English law have traditionally been divided into (i) conditions and (ii) warranties and (iii) intermediate terms.¹⁰⁰ A breach of an intermediate contractual term only entitles the party not in breach to terminate the contract where the breach is sufficiently serious, whereas a breach of condition entitles the innocent party to terminate a contract regardless of the severity of the breach. Therefore, the distinction is highly relevant to the contracting parties.

4.4.1.1 Conditions

Conditions are the essential provisions of a contract.¹⁰¹ This includes all provisions and stipulations in the agreement where the exact performance of an obligation of the contract is so vital for the other contracting party that it should be regarded a condition to the agreement to perform his or her part of the agreement. In other words, said provision is regarded to contain the substance of the contract to one party and the lack of due performance to the contractual word by the second contracting party would be considered a failure to perform under the contract at all.¹⁰² The performance of an obligation that is a condition of a contract must therefore take place in the exact time and condition as stated in the agreement or – absent any specific provision on the performance – in accordance with the parties' intention at the time of conclusion of the contract.

The breach of a condition constitutes in itself repudiation of the contract. As such, the principal function of a condition is to ensure certainty that the breach of such condition gives the innocent party the right to terminate the contract, and entitles the innocent party to

¹⁰⁰ H.G. Beale, "Chitty on Contracts, vol. 1", §§ 12-019 - 12-024 and Peel, "Treitel on the Law of Contract", § 18-048.

¹⁰¹ H.G. Beale, "Chitty on Contracts, vol. 1", § 12-026.

¹⁰² H.G. Beale, "Chitty on Contracts, vol. 1", § 12-026 with reference to Wallis, Son & Wells v Pratt & Haynes (1910) 2 K.B. 1003, 1012.

damages for the losses arising out said cancellation.¹⁰³ Damages under English law are however only recoverable up to the point where the contract is terminated, as there is no breach of contract after the cancellation.¹⁰⁴

4.4.1.2 Warranties

The warranties are the provisions of a contract that are less important than the conditions of the contract, or the terms that are collateral for the conditions of the contract.¹⁰⁵ Are the warranties breached, the party not in breach cannot see him- or herself as relieved of its obligations under the contract as a breach of warranty does not cause for treating the contract as repudiated.¹⁰⁶ However, the circumstances of the breach of a warranty entitles the party not in breach of a claim for damages caused by the breach of contract.¹⁰⁷

4.4.1.3 Intermediate terms

The intermediate terms are the terms of contract that are neither a condition nor a warranty. If an intermediate term of contract is breached, the party not in breach may be relieved from his or her obligations under the contract by cancellation of the contract, but only if the party not in breach is substantially deprived of the whole benefit of the contract. In other words, the nature of the breach is decisive as to whether or not the party not in breach may terminate the contract.¹⁰⁸

If the innocent party is not substantially deprived of the whole benefit of the contract, the remedy is damages for the losses suffered by said breach of contract only. On the other hand, is a condition of contract breached, the innocent party may choose to treat itself as discharged from further performance of its obligations under the contract.¹⁰⁹

¹⁰³ Peel, "Treitel on the Law of Contract", § 18-069.

¹⁰⁴ *Financings Ltd. v. Baldock* [1963] 2 QB 104.

¹⁰⁵ H.G. Beale, "Chitty on Contracts, vol. 1", § 12-031.

¹⁰⁶ H.G. Beale, "Chitty on Contracts, vol. 1", §§ 12-031 and 12-032.

¹⁰⁷ H.G. Beale, "Chitty on Contracts, vol. 1", § 12-031.

¹⁰⁸ H.G. Beale, "Chitty on Contracts, vol. 1", § 12-020.

¹⁰⁹ H.G. Beale, "Chitty on Contracts, vol. 1", §§ 12-019 and 12-034.

Termination of a contract may entitle the party not in breach to damages from the breaching party for future losses¹¹⁰ but only if the breach is either repudiatory or by renunciation.

4.4.2 When is a provision in a contract a condition?

A contractual provision is a condition when (i) it is either expressly stated so by statute, (ii) if a judicial precedent has categorised the given provision to be of such nature, (iii) if the provision is designed to be a condition in the contract or if the party not in breach under the contract is to be considered discharged from its obligations under the contract if the opposite party is in breach of said provision, or, (iv) if the nature of the subject-matter or the circumstances makes it likely that the contracting parties had intended that in case the given provision was breached, the party not in breach was to consider himself discharged from his obligations under the contract.¹¹¹ Lastly, if a provision containing an obligation to perform in a certain given timeframe, e.g. a date or interval, and that stipulation is regarded to be of the essence of the contract, the contractual provision will be deemed to be a condition of the contract.¹¹² If the term “of the essence” is used directly in the contract, the given provision containing that phrase will often be deemed to be a condition.¹¹³

4.4.3 Does the importance of commercial certainty influence whether a contractual provision is a condition?

Commercial certainty is regarded as being important under English law and therefore it has significant relevance whether a contractual provision is regarded a condition, a warranty or an intermediate term as the outcome of a breach of a provision under the contract is highly dependant under which category the provision falls.¹¹⁴

¹¹⁰ McMeel, Gerard, “The Construction of Contracts” §§ 20.10 and 23.31.

¹¹¹ H.G. Beale, “Chitty on Contracts, vol. 1”, § 12-040.

¹¹² H.G. Beale, “Chitty on Contracts, vol. 1”, § 12-037.

¹¹³ McMeel, Gerard, “The Construction of Contracts” § 20-19 and H.G. Beale, “Chitty on Contracts, vol. 1”, § 12-037.

¹¹⁴ H.G. Beale, “Chitty on Contracts, vol. 1”, § 12-037.

In leading English legal theory, it is however stated that there are a multitude of examples of provisions in mercantile contracts of different origin and form, where the outcome could be either one. As such, examples are mentioned of delivery of the vessel, time of notice of readiness, the time of payment of hire. etc., which were all considered to be conditions under the contract as the commercial certainty was a factor.¹¹⁵ However, it also stated directly that *“there is no presumption of fact or rule of law that time is of the essence in mercantile contracts and a stipulation as to time in such a contract, may on its true construction, be found to be merely an intermediate term.”*¹¹⁶ Decisive will thus be the wording of the contract itself and the factual circumstances in a given case.

4.5 English maritime law

The legal system in England is a common-law system, where the courts and judges play a significant role in deciding the legal position through decisions and usage of citations of previous cases as legal precedents in cases before them. There is as such no English statutes governing charterparties.¹¹⁷

The following presentation of the position under English law thus presupposes that a valid agreement subject to English law has been concluded, and the position introduced is as such English contract law rather than maritime law, but nonetheless specific for contracts related to the maritime field. The English position is introduced in section 4.4 and elaborated on under the introductions of the *Astra* and the *Spar Shipping* cases in sections 5.2.1 and 5.2.2.

¹¹⁵ H.G. Beale, “Chitty on Contracts, vol. 1”, § 12-037.

¹¹⁶ H.G. Beale, “Chitty on Contracts, vol. 1”, § 12-037, in fine.

¹¹⁷ Michelet, “Håndbok i tidsbefraktning”, p. 263.

4.5.1 The right of suspension and cancellation in case of late or insufficient hire payments

The right to suspend performance of the contractual obligations in case of the other party's breach of contract known in Norwegian and Scandinavian law¹¹⁸ is not recognised under English law. Under English law, the party not in breach has the right to terminate the contract, in this case the chartering agreement, not to withhold or suspend performances of such obligations.¹¹⁹ Therefore, if the charterers fail to make punctual and full¹²⁰ payment of any instalment of the hire, the ship-owner is – subject to the contractual provisions providing for e.g. the issuance and the expiry of any grace period¹²¹ – entitled under English law to withdraw the vessel from the services of the charterer thereby cancelling the charterparty.¹²² The withdrawal is final; no temporary suspension is possible.¹²³

The right for the ship-owners to terminate the contract in case of default by late or insufficient hire payments continue to exist even after the charterers may have made full payment and, therefore, no longer are in current default, unless the ship-owners has waived the right to withdraw the vessel either impliedly or explicitly.¹²⁴ The threshold for waiving of any such right is however by some characterised as low and particularly in the event of having received payment late, the ship-owner should act instantly and re-pay the payment received

¹¹⁸ See in this regard section 4.2.

¹¹⁹ Solvang, Trond: "Forsinkelse i havn", p. 104 and Østergaard, "Søretten i formueretligt perspektiv", p. 224 and Coghlin, Baker, Kenny, Kimball, Belknap, Jr., "Time Charters", § 16.74.

¹²⁰ Coghlin, Baker, Kenny, Kimball, Belknap, Jr., "Time Charters", § 16.74.

¹²¹ The anti-technicality note grants the charterer a period of grace in order to ensure that the vessel is not withdrawn on the basis of mere technicalities, see Coghlin, Baker, Kenny, Kimball, Belknap, Jr., "Time Charters", §§ 16.74 and 16.90-16.91.

¹²² Coghlin, Baker, Kenny, Kimball, Belknap, Jr., "Time Charters", § 16.74-16.75

¹²³ Coghlin, Baker, Kenny, Kimball, Belknap, Jr., "Time Charters", § 16.84-16.85 and § 16.111-16.119

¹²⁴ Coghlin, Baker, Kenny, Kimball, Belknap, Jr., "Time Charters", §§ 16.74-83.

in order not to be deemed to having waived its right of cancellation due to laches.¹²⁵ Nonetheless, the ship-owner is not estopped from exercising the right to withdraw the vessel neither if payments of hire historically have been received late¹²⁶ nor by the fact that the delayed payment has been received by ship-owner.¹²⁷

The ship-owners maintain the right to receive hire and other amounts owed under the chartering agreement up to the point in time where the agreement is terminated.¹²⁸ The right to claim damages as a consequence of the cancellation of the contract is dependant of the factual circumstances and the provisions in the given contract. The decisive factor is, as explained in section 5.3, is whether the party in breach was in repudiatory breach or not.¹²⁹

Contrary to Norwegian and Scandinavian law, there is no test as for reasonability in English law. In English law it is not questioned whether a strict application of the cancelling option might lead to unreasonable results. Under English law, the contract itself and the wording of the contractual is decisive.¹³⁰ Therefore, in English law foreseeability outweighs considerations as to reasonability.¹³¹

4.5.2 The cancellation right in terms of late delivery of the vessel

The charterer has the option to cancel a chartering agreement if the contract provides for it. If the chartering agreement contains a cancellation clause, the ship-owner's liability in case

¹²⁵ Michelet, "Håndbok i tidsbefraktning", p. 275 and Coghlin, Baker, Kenny, Kimball, Belknap, Jr., "Time Charters", §§ 16.82 and 16.98-16.101.

¹²⁶ Coghlin, Baker, Kenny, Kimball, Belknap, Jr., "Time Charters", § 16.82.

¹²⁷ Coghlin, Baker, Kenny, Kimball, Belknap, Jr., "Time Charters", 16.77.

¹²⁸ The anti-technicality note grants the charterer a period of grace in order to ensure that the vessel is not withdrawn on the basis of mere technicalities, see e.g. BIMCO's explanatory note to the NYPE93 Clause 11 and Coghlin, Baker, Kenny, Kimball, Belknap, Jr., "Time Charters", § 16.127.

¹²⁹ Coghlin, Baker, Kenny, Kimball, Belknap, Jr., "Time Charters", § 16.128-16.135.

¹³⁰ Falkanger, Bull, Brautaset, "Scandinavian maritime law", p. 31

¹³¹ Steen, Herman, "Cancellation clauses in voyage charter parties", p. 137.

of its breach of contract in form of late delivery of the vessel at the point in time agreed upon between the parties, is strict.¹³² This means that if the vessel is delivered later than the point in time indicated in the chartering agreement, either by a time of delivery or a cancellation time, the charterer is entitled to terminate the contract, regardless of the cause for such delay.¹³³ However, the charterer may only claim damages if the breach of contract by way of late delivery of the vessel amounts to a repudiatory breach of contract.¹³⁴

The ship-owner may, however, require the charterer answer to whether or not the charterer will accept a later delivery of the vessel. In such case, the ship-owner must provide a new time of delivery. If the charterer fails to reply after having received such request from the ship-owner, the indicated delivery date in the ship-owner's notice will be regarded the new cancellation time and/or delivery time of the vessel.¹³⁵ Also, the charterer may only cancel the chartering agreement before delivery has actually taken place.¹³⁶ If the charterer does not cancel the chartering the agreement, the ship-owner is still obliged to deliver the vessel as the passing of the cancellation time does not affect the parties' contractual obligations.¹³⁷

4.6 Comparison on Norwegian and English maritime law

In both legal systems, the starting point will be the chartering agreement and the wording of the provisions in said agreements.¹³⁸ The judicial systems will then interpret the clauses and the intentions of the contracting parties when they were drafting the clauses in order to determinate when and where a cancellation will be rightful.¹³⁹

¹³² Østergaard, "Søretten i formueretligt perspektiv", p. 231, Bråfelt, Camilla, "Fleksibilitet i certepartiforhold", p. 125.

¹³³ Coghlin, Baker, Kenny, Kimball, Belknap, Jr., "Time Charters", § 24.8.

¹³⁴ Coghlin, Baker, Kenny, Kimball, Belknap, Jr., "Time Charters", §§ 24.18 and 24.19.

¹³⁵ Coghlin, Baker, Kenny, Kimball, Belknap, Jr., "Time Charters", § 7.5 and § 8.35.

¹³⁶ Coghlin, Baker, Kenny, Kimball, Belknap, Jr., "Time Charters", § 24.16.

¹³⁷ Coghlin, Baker, Kenny, Kimball, Belknap, Jr., "Time Charters", §§ 24.4 and 24.15.

¹³⁸ Bråfelt, Camilla, "Fleksibilitet i certepartiforhold", p. 201.

¹³⁹ Bråfelt, Camilla, "Fleksibilitet i certepartiforhold", p. 201-202.

In Norway, the Norwegian Maritime Code will apply but as the provisions on e.g. cancellation in case of both hire payments¹⁴⁰ and late delivery¹⁴¹ are only declaratory¹⁴², the parties' may very well have determined otherwise in the chartering agreement¹⁴³ and, thus, the Norwegian Maritime Code will provide advice when resolving disputes arising out of the charterparty.

If the hire payment is delayed, the ship-owner is entitled to withdraw the vessel from the services of the charterer. Also, the delay in hire payment entitles the ship-owner to terminate the contract. Further, under Norwegian law the ship-owner is by declaratory law entitled to damages for the loss of bargain and any other losses suffered as a consequence of the counterparty's breach of contract.

Under English law, the charterer will *per se* be entitled to terminate the chartering agreement once the cancellation time occurs and the vessel has not been delivered to the charterer, provided that the charterparty include a provision containing such clause. In other words, under English law there is no test applied evaluating whether there was a breach of the contractual provisions in terms of the state of the vessel etc.¹⁴⁴

The right to receive damages subsequent to a breach of contract by the contractual counterpart is different from the legal position in Norway and dependant on both the exact wording of the contract, factual circumstances, and the background law. The position under English law will be examined further below section 5.2.

¹⁴⁰ The Norwegian Maritime Code Section 391.

¹⁴¹ The Norwegian Maritime Code Section 375.

¹⁴² The Norwegian Maritime Code Section 322.

¹⁴³ Falkanger, Bull, Brautaset, "Scandinavian maritime law", p. 37.

¹⁴⁴ Coghlin, Baker, Kenny, Kimball, Belknap, Jr., "Time Charters", chapter 24, *en contrario*, and Bråfelt, Camilla, "Fleksibilitet i certepartiforhold", p. 198.

5 The recent development in English law

5.1 Introduction - English authorities' influence on Norwegian law

Norwegian maritime law is influenced by English maritime law and Norwegian courts will find inspiration in English precedents if they feel the circumstances are applicable. One of the reasons for this is what has been described as “*the Scandinavian lack of authorities*.”¹⁴⁵ Another reason could be that the English tradition for a detailed decisions. In Norway decisions are often shorter and the judge's reasoning shorter, in Denmark the difference is even greater where often only the key points and the conclusion is published.¹⁴⁶ Therefore, a lot more arguments and understandings can be withdrawn from decisions given by English judges than Scandinavian. Another – and obvious – reason is that chartering agreements throughout the maritime sector, Scandinavia included, often chooses English law to govern the matter and an English venue for the arbitration proceedings in case of disputes arising out of or in connection with the agreement.¹⁴⁷ Further, the nature of international chartering agreements provides for an international understanding of the contracts concluded, and as English law is leading on the matter, English authorities can often not be ignored as the overall understanding of the parties intentions upon conclusion of a contract of this character will be an international understanding of the standardised contract form used by the parties.¹⁴⁸ The influence from English background law on Norwegian law and the understanding on Norwegian contract clauses is indisputable.¹⁴⁹

¹⁴⁵ Solvang, Trond: ”Forsinkelse i havn”, p. 56.

¹⁴⁶ Solvang, Trond: ”Forsinkelse i havn”, p. 59.

¹⁴⁷ See in this regard section 3 and Solvang, Trond: ”Forsinkelse i havn”, p. 67-69 and p. 102-103.

¹⁴⁸ Solvang, Trond: ”Forsinkelse i havn”, p. 71. The Arica case is an example of this, see Solvang, Trond: ”Forsinkelse i havn”, p. 73-83.

¹⁴⁹ Bråfelt, Camilla, ”Fleksibilitet i certepartiforhold”, p. 187-188.

Therefore, it is important to bear the English approach in mind when drafting and negotiating chartering agreements also governed by Norwegian law.¹⁵⁰ It is however always subject to careful consideration both of the subject matter and the legitimacy of the decision given and the authority of the court giving the decision, before applying any authority.¹⁵¹ Thus, it is a prerequisite for the usage of English authorities in the interpretation and understanding of a chartering agreement that there is a solution under English law giving clear guidance on the issue in dispute.¹⁵²

Two recent English court cases are pointing in directions that are not entirely unidirectional. In the following, the two cases will be examined and compared in more detail in order to provide a deeper perspective on the position under English law when it comes to non-payment of hire under chartering agreements.

5.2 Recent English case law

Under English law the ship-owner will usually have the right to cancel the charterparty even if the breach of the obligation to pay hire is trivial.¹⁵³ Recent English case law has however given rise to a discussion on how to classify time stipulations in chartering agreements when it comes to the charterer's obligation to pay hire.

In 2013, the case between Kuwait Rocks Co. and AMN Bulkcarriers was decided in England, leading to an extensive debate. Ship-owners worldwide appreciated the decision stating that an immense uncertainty as to whether or not the duty to pay timely hire under a chartering agreement was a condition had ended. However, in 2015 a similar case between Grand China Logistics and Spar Shipping was decided by the same Commercial Court in England. And the decision was exactly the opposite. Once again, the debate initiated.

¹⁵⁰ The Swedish scholar Kurt Grönfors is in favour of interpreting Swedish and Scandinavian law in the light of English law, which seems to go a bit further than legal theory from Norway and Denmark. See Grönfors, Kurt, "Tolkning av fraktavtal", p. 50-51.

¹⁵¹ Solvang, Trond: "Forsinkelse i havn", p. 113-116.

¹⁵² Bråfelt, Camilla, "Fleksibilitet i certepartiforhold", p. 39.

¹⁵³ Steen, Herman, "Cancellation clauses in voyage charter parties", p. 137.

In the following, the two cases will be introduced to bring perspective to the introduction to English law on contracts above and to bring up the factual circumstances of the cases as they are important to make the underlying premise on whether or not the chartering agreements and the legal status on the hire payment provisions in said agreements tangible.

5.2.1 The Astra¹⁵⁴

5.2.1.1 The facts of the case

The Astra was chartered by Kuwait Rocks Co. under a time charterparty dated 6 October 2008 based on the NYPE46 standard form for a period of five years from AMN Bulkcarriers Inc.¹⁵⁵ The hire was to be paid in cash 30 days in advance.¹⁵⁶ If the charterer failed to comply with this payment requirement, the ship-owner was entitled to withdraw the vessel from the service of the charterer.¹⁵⁷ If due payment was not made, the ship-owner should provide the charterer with a written notice to comply with the payment requirement and allow the charterer an additional two days to rectify the failure to provide due payment.¹⁵⁸

After delivery of the vessel, the market rates started falling and the charterer's sub-charter hire was subsequently lower than the contractual hire agreed upon between the ship-owner and the charterer. In January 2009 the charterer therefore asked for a re-negotiation of the hire originally set to USD 28,600 daily and asked for a reduction by one-third to a daily rate of USD 19,600. A few proposals of a lesser deduction followed in the months to come before the charterer made a statement letting the ship-owners of the vessel know that the

¹⁵⁴ Kuwait Rocks Co v. AMB Bulkcarriers Inc. [2013] EWHC 865 (Comm).

¹⁵⁵ The Astra, para. 2.

¹⁵⁶ The NYPE46 time clause 5 is referred to and quoted in the Astra, para. 3.

¹⁵⁷ The Astra, para. 3.

¹⁵⁸ The NYPE46 time clause 31 is referred to and quoted in the Astra, para. 3.

owners of the charterer would declare the charterers bankrupt if the hire was not lowered.¹⁵⁹

After the instalment hire due on 1 July 2009 was not paid, a reduced daily hire of USD 21,500 was agreed upon for the coming 12 months. In this connection, an addendum to the charter-party was made.

The re-negotiated hire rate and the conclusion of said addendum did, however, not stop the charterer's requests for further reductions in the daily hire rate or threats of declaring the charterer bankrupt if the ship-owners did not comply with the charterer's wishes. The charterer was as such still losing money on a daily basis, as the sub-charter hire was lower than the agreed hire between the charterer and the ship-owner.¹⁶⁰

Once the addendum was set to expire, in July 2010, the charterer failed to make timely payment of the hire. The ship-owner subsequently issued an anti-technicality note¹⁶¹ in response to which the charterer asked for an extension of time to make payment. The ship-owner offered to extend the period with the lowered rate for a further three weeks if the charterer then would make full payment. However, the charterer failed to make payment and on 4 August 2010, the ship-owner withdrew the vessel from the service of the charterer, terminated the charter-party and initiated arbitral proceedings.¹⁶²

¹⁵⁹ The Astra, para. 4.

¹⁶⁰ The Astra, para. 7-8.

¹⁶¹ The anti-technicality note grants the charterer a period of grace in order to ensure that the vessel is not withdrawn on the basis of mere technicalities, see e.g. BIMCO's explanatory note to the NYPE 93 Clause 11 and Coghlin, Baker, Kenny, Kimball, Belknap, Jr., "Time Charters", § 16.90-16.91.

¹⁶² The Astra, para. 9-12.

5.2.1.2 The arbitration award

The ship-owner claimed compensation for loss of earnings from 4 August 2010 until expiry of the time charterparty on 9 November 2013 crediting the hire the ship-owner had been able to recover under a substitute charter-party.¹⁶³

The arbitrators decided that the charterer's duty to pay hire in clause 5 of the NYPE charterparty used by the parties was not a condition for the contract under English law.¹⁶⁴ The arbitrators did however state that in accordance with clauses 4 and 6 of the NYPE contract, the ship-owners were entitled to damages for future loss of earnings if the contract was terminated or cancelled as a result of "*any breach or failure of the charterers to perform its obligations*".¹⁶⁵

The arbitrators also decided that the charterer was in repudiatory breach of contract as the charterer by their actions had conduct had "*evinced an intention no longer to be bound by the charterparty*".¹⁶⁶ Further, the arbitrators acknowledged the ship-owners' arguments that the charterer's actions by repeatedly threatening to declare bankruptcy amounted to repudiatory breach.

The charterer appealed the arbitrators' award arguing that, firstly, the tribunal had applied the wrong test in order to find that they were in repudiatory breach of contract and, secondly, that the tribunal had not found that the compensation clauses in the addendums were penalty clauses.¹⁶⁷ The ship-owner on the other side appealed the decision that the duty to pay hire under the charterparty was not a condition. The latter is the important part in this regard.

¹⁶³ The Astra, para. 13.

¹⁶⁴ The Astra, para. 14.

¹⁶⁵ The Astra, para. 16.

¹⁶⁶ The Astra, para. 17-21.

¹⁶⁷ Clause 4 of Addendum 1 and/or clause 6 in Addendum 2, see the Astra, para. 23.

5.2.1.3 The Commercial Court's decision

The case was decided by Justice Flaux of the Commercial Court, who decided that the wording of clause 5 in the NYPE charterparty “*makes it clear that there is a right to withdraw whenever there is a failure to make punctual payment*” and that such right of withdrawal is per se a right to terminate the contract. Further, it was found that “*this (right to withdraw) is a strong indication that it was intended that failure to pay hire promptly would go to the root of the contract and thus that the provision was a condition.*”¹⁶⁸

Secondly, Justice Flaux found that where time provisions are used in commercial contracts, time is to be considered to be of the essence and, as such, the relevant provision is a condition under the contract.¹⁶⁹

Thirdly, Justice Flaux found that the consideration to the importance of commercial certainty in commercial transactions results in the necessary outcome that a provision as clause 5 in the NYPE contract is a condition of the contract as it would leave the ship-owners “*in a position of uncertainty as to whether to withdraw the vessel or to soldier on with a recalcitrant charterer until such time as the owners were in a position to say that the charterers were in repudiatory breach*”.¹⁷⁰ As such, the ship-owner met by a breach of contract would be left with no remedy or alternative to make the most of the situation in the current contractual relationship if the market was falling, if the charterer's actions were not repudiatory.¹⁷¹

¹⁶⁸ The Astra, para. 109

¹⁶⁹ The Astra, para. 110

¹⁷⁰ The Astra, para. 115.

¹⁷¹ The Astra, para. 115.

5.2.2 The Spar Shipping¹⁷²

5.2.2.1 The facts of the case

Grand China Logistics chartered by way of three charterparties three bulk carriers from the registered ship-owner, Spar Shipping. All charterparties were on NYPE 93 forms.¹⁷³ From April 2011, the charterer was in arrears with payments of hire and after having called on the guarantees provided by the charterer, the ship-owner withdrew two of the vessels and terminated the related charterparties on 30 September 2011.¹⁷⁴ The ship-owner then commenced arbitral proceedings against the charterer claiming the hire due under the charterparties and loss of bargain for the term from the cancellation of the charterparties until expiry. Shortly after, and prior to the arbitral hearing, the charterer went into liquidation. The ship-owner thus brought the claim against the charterer under the guarantees provided.¹⁷⁵

The ship-owner contended that it was entitled to damages for loss of bargain as the payment of hire was a condition of the contract, alternatively an innominate term and the lack of payment constituted repudiatory breach of contract.¹⁷⁶

5.2.2.2 The Commercial Court's decision

The case before the Commercial Court was decided by Justice Popplewell who disagreed with Justice Flaux on a number of issues¹⁷⁷ and thus concluded that the payment of hire was not a condition as “(i)f the owner is not paid fully and on time in advance, effect should be given to the right for which he has bargained, in unqualified terms, no longer to provide

¹⁷² Spar Shipping AS v. Grand China Logistics Holding (Group) Co. Ltd. [2015] EWHC 718 (Comm).

¹⁷³ The Spar Shipping, para. 1.

¹⁷⁴ The Spar Shipping, para. 3.

¹⁷⁵ The Spar Shipping, para. 4-5.

¹⁷⁶ The Spar Shipping, para. 8-9.

¹⁷⁷ The Spar Shipping, para. 95.

the services of the master and crew to the defaulting charterer, and to be free to employ his vessel elsewhere.”¹⁷⁸

In addition, Justice Popplewell did not find that when there is a contractual right to terminate the contract for the breach of a given provision, said provision is automatically a condition of the contract.¹⁷⁹

Justice Popplewell also found that in mercantile contracts there is no presumption that indications of time as e.g. the time payment makes such provisions of the essence absent indications to the contrary in the given contract.¹⁸⁰

Further, Justice Popplewell found that the contract has been negotiated between “*hard-headed and experienced business men*”¹⁸¹ and that the parties’ exposure was balanced as the charterer in a risen market would bear the risk of having to charter in vessels at a higher rates if the contract had been terminated.¹⁸²

As such, Justice Popplewell, disagrees with Justice Flaux that there is a single and central issue of commercial certainty to take into account as Popplewell states that “*there is no uncertainty over the ability to put an end to future performance.*”¹⁸³ Popplewell elaborates explaining that the party not in breach cannot be certain as to when the exact point in time is when he is enabled to recover damages for the loss of bargain but that this uncertainty is common to all commercial contracts and that “*owners of vessels are not unique in the commercial world (...)*”¹⁸⁴

¹⁷⁸ The Spar Shipping, para. 114.

¹⁷⁹ The Spar Shipping, para. 155.

¹⁸⁰ The Spar Shipping, para. 167.

¹⁸¹ The Spar Shipping, para. 140 with a quote from *Empresa Cubana de Fletes v. Lagonisi Shipping Co. Ltd. (The Georgios C)* 1971 1 QB 488.

¹⁸² The Spar Shipping, para. 141.

¹⁸³ The Spar Shipping, para. 200.

¹⁸⁴ The Spar Shipping, para. 200.

Popplewell further reasoned that the standard contracts used in this matter has had the same wording as for the payment clauses in 40 years without any of neither the ship-owning entities nor the chartering companies have felt the need to elaborate on the wording making timely payment “of the essence” and as such an obvious condition of the contract.¹⁸⁵

5.2.3 Comparison

Both decisions contain numerous amount of references to various authorities, precedents, legal theory and scholarly writings. One concerns the NYPE46-form (clause 5) and the other the NYPE93-form (clause 11) but although the differences in general between the two forms are significant, there is no distinction between the two clauses regarding the payment of hire.¹⁸⁶

The decisions, however, are distinct on a number of issues, of which the following four are the most interesting:

- (i) the right to withdraw the vessel is an indication that the payment of hire ought to be considered a condition of the contract;
- (ii) there is a general principle in mercantile contracts that time is of the essence and, therefore, that timely hire payment was a condition of the contract;
- (iii) the anti-technicality clause in the chartering agreement is an indication that timely hire payment was a condition of the contract; and
- (iv) the need for commercial certainty between the contracting parties provided for the timely hire payment to be considered a condition of the contract.

Justice Flaux reviewed in detail the various previous cases which have touched upon the question of whether a failure to pay hire amounts to a breach of condition as opposed to a

¹⁸⁵ The Spar Shipping, para. 201 and para. 205.

¹⁸⁶ See BIMCO’s explanatory note to the NYPE93 Clause 11.

breach of an innominate term. Justice Flaux reached the conclusion that payment of hire was a condition of the contract and that the failure to make due payment of hire, therefore, entitled the ship-owners to withdraw the vessel from the service of the charterers and claim damages for the loss of profit for the remaining charter period.

Justice Popplewell reached the opposite conclusion after an equally detailed analysis of the authorities and precedents and following a careful analysis of the each of the arguments and legal principles mentioned in *The Astra*.

5.2.3.1 The right to withdraw the vessel is an indication that the payment of hire ought to be considered a condition of the contract

Justice Popplewell disagreed with Justice Flaux that the right to terminate the chartering agreement with reference to the failure to provide punctual payment meant that non-payment was sufficiently serious to justify cancellation and therefore that the failure to pay due hire was intended to be a condition under the contract by the contracting parties.

Justice Flaux's primary reasoning for his conclusions was that the right to withdraw the vessel was "*a strong indication that it was intended that failure to pay hire promptly would go to the root of the contract and thus that the provision was a condition.*"¹⁸⁷ Justice Popplewell on the other hand is of the opinion that the right to withdraw the vessel is necessary due to the fact that the parties did in fact not meant for the hire payment to be a condition of the contract. Popplewell states in this regards that the "*existence of a termination provision tells one nothing about the status of the term without discovering the intention of the parties as to the consequences of the contractual right of termination by this process of interpretation.*"¹⁸⁸

¹⁸⁷ *The Astra*, para. 109.

¹⁸⁸ *The Spar Shipping*, para. 155.

The withdrawal clause in the Spar Shipping case provided, thus, only for the ship-owner to withdraw the vessel from the service of the charterers in case of non-payment of hire, and the chartering agreement did not make payment of hire a condition as the wording of the provision did not contain the necessary express wording to have that effect.

5.2.3.2 There is a general principle in mercantile contracts that time is of the essence and, therefore, that timely hire payment was a condition of the contract

Secondly, Justice Flaux reasoned that there is a general rule within commercial, mercantile contracts that time is of the essence, even without express stating it so, when the provision provides for something to happen at a certain point in time. Therefore, the obligation to pay hire a condition of the contract.¹⁸⁹

Justice Popplewell disagreed and with reference to a substantial number of precedents and legal theory decided that under English law, time of payment is not of the essence in mercantile contracts without expressly agreed so and stipulated in the contract.¹⁹⁰ Therefore Justice Popplewell found that the contracting parties could not have had the intention that any breach, no matter how serious or minor, of the hire payment obligation should have the consequence to allow the ship-owners to terminate a long-term charterparty even for a trivial breach of contract.

5.2.3.3 The anti-technicality clause in the chartering agreement is an indication that timely hire payment was a condition of the contract

Justice Flaux then argued that the even though the contract contained an anti-technicality clause, payment of hire could be seen as a condition of said contract – and that the mere

¹⁸⁹ The Astra, para. 110.

¹⁹⁰ The Spar Shipping, para. 203.

existence of this clause, on the contrary, evidenced the importance of payment of the hire in due time.¹⁹¹

Justice Popplewell on the other hand stated that the existence of such a clause was not in favour of the argument that payment should be considered a condition.¹⁹² Put simply, Justice Popplewell considered the history and development of anti-technicality clauses and stated that such clauses cannot influence whether or not payment is a condition but merely regulates the circumstances under which the ship-owner's can withdraw the vessel in case of default.

5.2.3.4 The need for commercial certainty between the contracting parties provided for the timely hire payment to be considered a condition of the contract

Fourthly, the issue of commercial certainty divides the two judges. Justice Flaux was of the opinion that if the the ship-owners were left in commercial uncertainty if the ship-owners were merely entitled to withdraw the vessel and not entitled to receiving damages for loss of bargain in case of non-payment as the ship-owners then, in a falling market, would have to chose between two evils; (i) to withdraw the vessel and contract with a different charterer – if at all possible -, or (ii) carry on business with a charterer reluctant or unwilling to pay the hire agreed upon in the chartering agreement.¹⁹³ Justice Popplewell responded that there existed no uncertainty as the party not in breach had the contractual possibility to terminate and withdraw the vessel in case of breach, whilst the certainty to rightfully claim damages was a different issue.¹⁹⁴

Justice Flaux also emphasised that receiving hire is the single most important part of any chartering agreement for the ship-owner. A breach of contract which has the effect of mak-

¹⁹¹ The Astra, para. 111.

¹⁹² The Spar Shipping, para. 182.

¹⁹³ The Astra, para. 115.

¹⁹⁴ The Spar Shipping, para. 205.

ing the ship-owner put out money to cover the performance of the charterer's orders is to be considered so serious as to amount to a breach of a condition of contract,¹⁹⁵ as the ship-owner then would act as the charterer's bank or credit facility.

Justice Popplewell is opposing to this argumentation, stating that chartering agreements often covers a charter period of multiple years and that claiming damages for the remaining period of the chartering agreement would not be proportionate.¹⁹⁶ And that such result could not have been regarded to be the joint intentions of the contracting parties. Justice Popplewell did not refer to them but it seems that the background for his findings may be that a ship-owner in case of the party's breach of contract is not left entirely without remedies. The ship-owner has a lien on sub-freights; he can intercept the bill of lading freight; or suspend the services of the vessel.¹⁹⁷

5.3 Sub-conclusion

Justice Popplewell found himself unable to follow the decision of Justice Flaux in *The Astra* and concluded that payment of hire by the charterers was not a condition of the contract. And after reviewing basic English theory on the matter, it may not come as a surprise that the decision in *The Astra* was not followed. The previous six editions of the leading textbook on time charterparties¹⁹⁸ all advise that payment of hire is not a condition of the contract. The latest, 7th edition from 2014 proposes to await a new decision as the *Astra* is considered controversial.¹⁹⁹ Justice Popplewell's lengthy analysis on English law and many

¹⁹⁵ *The Astra*, para. 42.

¹⁹⁶ *The Spar Shipping*, para. 198-205.

¹⁹⁷ If under a NYPE-form. Both the *Astra* and the *Spar Shipping* was on NYPE46-forms. See section 3.1 for the examination of the NYPE93. Both editions contain similar provisions; in NYPE in Clause 18, in NYPE93 in Clause 23.

¹⁹⁸ Coghlin, Baker, Kenny, Kimball, Belknap, Jr., "Time Charters".

¹⁹⁹ Coghlin, Baker, Kenny, Kimball, Belknap, Jr., "Time Charters", § 16.128

references to authorities and precedents was foreseen by at least a few English solicitors and, as well, subject to a lengthy criticism at this institute.²⁰⁰

The decision is as such likely to restore the previously accepted view that the obligation to pay hire under a time charter is not a condition if not the contracting parties explicitly agrees to it. If a ship-owner wants to recover damages for loss of bargain following a cancellation, the ship-owner must seek to bring the charterparty to an end for repudiatory breach of contract and, in doing so, demonstrate that charterers' default is sufficiently serious as to deprive the ship-owners of substantially the whole benefit of the charterer. Alternatively, the ship-owner must make it clear from the wording that payment of hire is indeed a condition of the contract.

6 Discussion

6.1 Which of the English precedents should be followed?

The two decisions were given by the same Commercial Court and none of them were appealed. Therefore, some uncertainty as to the legal character and the remedies given the party not in breach in case of non-payment of hire remains. In the following, I will discuss my view on which of the decisions should be followed in the future.

As we have seen, leading scholars since 1973²⁰¹ agreed that the obligation to pay hire under time charterparties is not a condition. A recent master thesis with this institute concluded the same and was recently published in the *MarIus* publications, which continuously publish the leading scholarly writings of both students and professors and professionals within the maritime field in Scandinavia. However, since there now seems to exist two schools, one must

²⁰⁰ Jolanta Zabityte: "The Obligation to Pay Hire in Time-Charterparties", Oslo, 1 November 2014.

²⁰¹ The decision given in the *Brimnes*, (1972) 2 Lloyd's Rep. 465, See Coghlin, Baker, Kenny, Kimball, Belknap, Jr., "Time Charters", § 16.129.

decide which is the right to follow. Or most right. In the following, the thesis will discuss which of decisions given should be followed in the future.

Justice Popplewell decided in the Spar Shipping case that the obligation to pay hire is not a condition under the charterparty, reasoning that ship-owners should not be treated in any other way than parties to other commercial contracts.

Having the utmost respect for the legal reasoning in both the decisions, the discussion will not include general aspects of English law but merely focus on the discussion between the two judges on commercial certainty.

Justice Popplewell suggested that since nothing in the charterparty explicitly stated that hire payment was a condition, there was no reason to consider whether this was the case, nor for arbitrators or judges to interpret the contract in such manner. One could however suggest otherwise, bearing in mind the reasoning behind Justice Flaux's argument on "commercial certainty" and the factual circumstances behind the dispute.

Commercial certainty as a concept relates to the foreseeability and reasonableness from a commercial point of view of the outcome of a legal dispute. As we have seen, the NYPE standard chartering agreement gives the ship-owner the right to withdraw the vessel from service of the charterer if the hire is not received as provided for in the contract. If subject to English law, any delay in payment is sufficient for the ship-owner to rightfully withdraw the vessel. As we have also seen, the hire is to be paid in advance in order to finance the expenses of the ship-owner and to provide security for charterer's obligations.

In a static market, these considerations would be the only ones to consider. However, the market is not static.

In a rising market, the pressure will be on the charterer to continuously perform timely in order to keep the contract which is now a bargain for the charterer. If the charterer fails to per-

form and make due payments, the ship-owner will undisputedly be entitled to terminate the contract. Thus, the charterer will make timely, prompt and regular payments as the sanction otherwise likely to be imposed by the ship-owner will deprive the charterer of a substantial benefit. In a falling market, the tables have turned.

If one is to follow the decision of Justice Popplewell, the ship-owner only has the possibility to terminate the contract and let the vessel to other parties in the market. As the market is falling, the ship-owner will be deprived of the benefit of the initial contract as damages are only collectable if the breach is deemed repudiatory. The charterer can thus breach the obligation to make timely payments only to put even more pressure on his contractual counterparty. The party not in breach is thus the one under pressure, as the ship-owner is likely to await future payments instead of terminating the contract as the monetary outcome might be even worse if terminating than for example re-negotiating.

In any contract, incentives and possible sanctions are the driving factor for the parties. “What is in for me?” seems to be common logic for every business man. And if we exclude the inclusion of softer motives like the consideration to one’s brand and general reputation in a market as a reliable business partner, the monetary incentives and possible sanctions are often the most efficient. In a falling market, the charterer would not be met with any sanctions if the only sanction available for the ship-owner was to withdraw the vessel. The charterer would be rewarded for the breach of his or her contractual obligations.

In my opinion, Justice Popplewell failed to look at the charterparty through the eyes of the parties concluding the contract but merely focused on the strictly legal history of shipping under English law. Justice Popplewell suggested as such that there is “*nothing in the owners’ interest which is not adequately protected by an option to cancel*”.²⁰² This is true in a static market or a market on the rise, but far from the truth in falling market. Justice Popplewell

²⁰² The Spar Shipping, para. 114.

acknowledges this uncertainty but states that the risks of the market are even for both contractual parties as no-one can foresee how the market may or may not develop.²⁰³

I see a few problems with this way of seeing things.

One, the ship-owner is – if payment of hire is not considered a condition – only entitled to damages if the breach is repudiatory. If not, the ship-owner will receive no damages as for the loss of bargain. If the obligation to pay hire is considered an obligation, the ship-owner will receive what he or she was entitled to under the contract as had it been fulfilled, and the contracting parties will as such be in the same position as they would have been in in either case.

Two, there is a substantial lack of commercial balance between the parties if the decision given by Justice Popplewell is to be followed. As such, one of the contracting parties – the charterer – will be handed the upper-hand in terms of re-negotiating the terms of the contract if the market is falling. The charterer is risking nothing but to have the vessel withdrawn with whatever inconveniences following from having to charter a substitute vessel etc. The ship-owner on the other hand will meet imminent economic consequences as the market is now a different one.

Legal theory and tradition should not be in the way of the commercially balanced result. If the decision given in the *Spar Shipping* case is to be followed, a severe enough sanction for the charterer to ensure timely payment does not exist. Thus, the decision in the *Astra* is in my perspective to be preferred.

²⁰³ The *Spar Shipping*, para. 141.

6.2 The cancellation and suspension clauses in the standard chartering agreements

6.2.1 The provisions in the standard chartering agreements

6.2.1.1 Non-payment of hire

All of the standard chartering agreements contain provisions stating that the hire must be paid in advance. Further, they all contain provisions giving the ship-owner the right to cancel the chartering agreement if hire is not paid after a notice and the expiry of an additional period of time for the charterer to make payment.

As such, the provisions aim to ensure foreseeability and commercial certainty by fixing the consequences for the innocent party facing a breach of contract by its counterpart.

The cancellation clauses incorporated in the chartering agreements thus make it easier to foresee when the party not in breach can rightfully cancel a chartering agreement without risking unlawful cancellation of the contract, making itself liable for breach of contract?²⁰⁴ However, the chartering agreements fail to provide provisions as to when damages are payable and as such they do not contain the remedies if the charterparty is breached. This matter is governed by the choice of jurisdiction of the contracting parties. As such, the cancellation clauses do not by themselves provide neither foreseeability nor commercial certainty.

Thereby, the chartering agreements does not contain provisions that explicitly ensure such commercial certainty. All of the agreements introduced rather provides provisions giving the contractual parties a series of rights when the contractual counterpart is in breach. Thus, the commercial certainty must be ensured when applying the background law and interpreting the contractual provisions. As such, the standard chartering agreements are subject to the same criticism as mentioned above. Only if the decision given in the *Astra* is followed,

²⁰⁴ Steen, Herman, "Cancellation clauses in voyage charter parties", p. 118.

the agreements ensures commercial certainty. If not, the wording of the provisions should be revised if the industry indeed wishes to have commercial certainty when entering into chartering agreements.

6.2.1.2 The cancellation clauses when the vessel is delayed

The standard chartering agreements also contain provisions giving the charterer the right to cancel the contract if the ship-owner is in breach of contract by not providing the charterer with the vessel at the agreed time. As such, the provisions determine specifically when the ship-owner is in breach and when the charterer may terminate the contract because of this breach. In other words, the evaluation of the breach is straight forward. But does it ensure foreseeability and creates commercial certainty amongst the contracting parties?

If we use the same examples as above, with market fluctuations, the ship-owner will in a fallen market of course be interested in making timely delivery as he or she otherwise will be met with a cancellation and will have to charter off the vessel again at a lower rate. On the other hand, in a market on the rise, the ship-owner does not have the incentive to make delivery within the cancellation time as there is no remedy in the contract for late delivery.

The same is true if the example is twisted and voyage charterparties are used as an example. If the ship-owner fails to provide the vessel timely but the port of delivery is located in a geographically distant part of the world, where the vessel would have to cross waters with little or no regular traffic, the charterer will have little incentive to cancel the contract. Thus, the ship-owner is in a strong commercial bargaining position.²⁰⁵ However, is the case the opposite, meaning that the cargo is positioned in an area where traffic is regular and easily accessible, the charterer will on the other hand have the upper hand in re-negotiating with the imminent threat for the ship-owner to be faced with a rightful cancellation of contract as a result of delay where the chartering agreement contains a cancellation clause.

²⁰⁵ Steen, Herman, "Cancellation clauses in voyage charter parties", p. 119 and p. 160.

As such, Justice Popplewell has a valid point when suggesting that the risks of the contracts are balanced. They may well be foreseeable but they are not commercially certain as the lack of fixed a monetary sanction does not cause the parties to fulfil their contractual obligations.

6.3 Commercial certainty under Norwegian law

6.3.1 Hire payment

The Norwegian Maritime Code provides clear bases for suspension and cancellation when met by a breach of contract by a contractual counterpart. Hire is to be paid in advance and, if not, the innocent party may withhold performance of his or her contractual obligations awaiting contractual performance by the party in breach. When the breach of contract is substantial, the contract may be cancelled and the innocent party is entitled to damages. The threshold for when the breach is deemed to be substantial is either agreed upon by the parties to the contract, or determined by the background law. As we have seen, the parties are free to agree to lower the threshold for when a breach may be seen as substantial. If not, the background law provides advise on the matter.

Whilst Norwegian contract law is somewhat fiduciary on when a breach of contract is substantial and leaves substantial room for errors or faulty conclusions when evaluating whether or not a breach is substantial, the Norwegian Maritime Code offers firm advice on the matter.

In general contract law the definition of a substantial breach is vague:

“the characteristic for the termination because of a breach of contract is not only that the (innocent) party has been deprived of the benefit of the contract but that the

*deprivation is so material that it would not be reasonable to uphold the contract itself.”*²⁰⁶

However, the Norwegian Maritime Code is specific. If the charterer does not pay the hire timely, the vessel may be withdrawn, the charterparty terminated and damages are payable. And if the ship-owner fails to deliver the vessel timely, the charterer may cancel the charterparty and claim damages.

6.3.2 Delay in delivery

When it comes to the delay in the delivery of the vessel from ship-owner to the charterer, the Norwegian Maritime Code is clear as well. If the vessel is delayed, the charterer may cancel the charterparty and the ship-owner is liable to pay damages to the charterer for the losses suffered as a consequence of the delay. The cause of the delay is immaterial.

6.3.3 Sub-conclusion

When putting the looking at findings above and comparing them other standardised commercial contracts used in Norway, the picture is the same. In shipbuilding, the contracting builder continues to hold the title to the vessel until delivery²⁰⁷, and that the right for the buyer of the vessel to claim delivery of the vessel is interdependent on the full payment of the purchase price.

In construction contracts, the principle is the same. If the buyer is in breach of contract, the buyer is liable to pay the contracting builder damages for the loss of bargain and the costs

²⁰⁶ Krüger: “Kontraktsrett,” p. 759. My translation. The original quote is: “*det karakteristiske for misligholdshevning er dermed ikke bare at parten er unddratt det kontrakten forspeiler ham, men at avviket dessuten er såvidt kvalifisert at det ikke anses som rimelig at kontrakten skal stå ved lag.*”

²⁰⁷ Meland, Øystein, “Skipsbygging – Kommentarer til Norsk Standard Skipsbyggingskontrakt”, p. 26 and p. 65.

related to cancellation of the contract.²⁰⁸ In a recent case, the building contractor was awarded a compensation of a total of 15 % of the total contract value.²⁰⁹ Furthermore, both in onshore construction²¹⁰ and in the offshore construction²¹¹, the contracting builder is met with daily penalties if the works either does not progress according to plan or if delivery is delayed.²¹²

The Norwegian Maritime Code and the Norwegian, and Scandinavian legislation as such, have incorporated and implemented the commercial factors so that the legal result is both legally and commercially foreseeable and commercially sane. A result as the one reached by Justice Popplewell seems not just unlikely but unthinkable.

7 Conclusion

Concluding the process of examining four of the most commonly used chartering agreements in the industry, two decisions given by the Commercial Court in England and the legal literature and articles relating to the subject, the biggest mystery seems to be what the fuss in the industry was all about. Six former issues of the leading legal theory on charterparties²¹³ governed by English law all agree that payment of hire is not a condition. Four of the most commonly used charterparties all have English law as the default choice, and

²⁰⁸ NS8405 clause 39(5), Marthinussen, Giverholt, Arvesen, “NS8405 med kommentarer”, p. 675-677, and Bredholt, Martens, Mathiasen, Philip, “Søloven med kommentarer” p. 675.

²⁰⁹ Rt. 2003.486.

²¹⁰ Marthinussen, Giverholt, Arvesen, “NS8405 med kommentarer”, chapter 34.

²¹¹ Off shore construction contracts – or more commonly “*petroleumskontrakter*” in Norwegian – are covered by two standard contracts; the Norsk Fabrikasjonskontrakt or the Norsk Totalkontrakt referred to as NF07 and NTK07.

²¹² On offshore construction, see NF07 Article 24(2), Kaasen, Knut, “Petroleumskontrakter”, p. 614-622. On onshore construction, see NS8405 Section 34(2), Marthinussen, Giverholt, Arvesen, “NS8405 med kommentarer”, chapter 34, and Hagstrøm, Bruserud, “Entrepriserett”, p. 350-355.

²¹³ Coghlin, Baker, Kenny, Kimball, Belknap, Jr., “Time Charters”.

that parties to the contracts should thus all be well aware of the possible outcome if being met by one of the breaches of contract topics of this thesis.

The second-largest mystery must be why English law – up until the decision given in the *Astra* and after the *Spar Shipping* – did not weigh commercial certainty higher. Maybe because the contracting parties are well aware of the legal position and that the charterparties as such ensures foreseeability. The parties are and were free to agree on a different outcome in advance by drafting the contracts differently. As such, one could argue that if the parties are all well aware of the possible outcome that too is commercial certainty. To me, Justice Flaux managed to balance the commercial certain result with the commercially sane result.

However, Justice Popplewell's point that the risks are balanced is to some extent true. As we have seen, the situations in delays of hire payment and the delays in delivery of the vessel under the same chartering agreements are highly comparable. As such, there is an overall balance, but the balance in the contractual relationship if you look at the contractual provisions isolated is non-existing. Delivery of the vessel happens once in a time charterparty, whilst hire payments are a regularly recurring occurrence and the financial risks are significant for the ship-owner. Even from an overall perspective, the contractual balance merely exists until the market moves. Once the market moves, an upper hand is given one of the contractual parties. History tells us that most commercial markets are not static. The shipping trade is no different.

Specifically regarding the hire payments, the balance in the chartering agreements is disturbed when the charterer by not paying the hire can provoke a situation where the ship-owner is forced to re-negotiate the terms of the chartering agreement. The charterer does not risk anything but having the vessel withdrawn from its services and if the market rates are lower than at the time the contract was agreed, the charterer as such has nothing to lose but everything to win from such a manoeuvre.

Ship-owners often contract for the construction of vessels when having already agreed the terms of a time chartering agreement or at least having a charterer ready to time charter the vessel once constructed. Also, the vessels are often constructed as per the instructions of the charterer so that the vessel meets the specific requirements of the charterer.

The risks of being a ship-owner are therefore substantially increased if the decision in the *Spar Shipping* is to be followed, as the ship-owner takes all risks related to the development in the market once the chartering agreement is running. Obviously, depending of when the hire under the chartering agreements is fixed, the risk of market fluctuations prior to delivery of the vessel may be born by the time charterer. As pointed out above, that risk however is only relevant up until delivery whilst the risks of the ship-owner continues to run throughout the duration of the time charterparty.

Therefore, and with reference to the arguments and reasons, I have suggested above, the decision in the *Astra* is in my opinion to be favoured. The charterer has one fundamental obligation under a time charterparty: to pay the hire. At the same time, the ship-owner's primary obligation is to provide the charterer with a vessel at the agreed point in time.

The preparatory works to the Norwegian Maritime Code stipulates the ambition for the statute to make its mark on the understanding of international chartering agreements even where Norwegian law is not directly applicable.²¹⁴ To me it seems obvious and indeed advisable that when it comes to the suspension and cancellation clauses and the right to damages when being met by a breach of contract of such fundamental character, the world should look to Norway.

²¹⁴ NOU 1993: 36, p. 15-16.

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